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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No.

F. J. PERILLO and RUTH E. PERILLO, husband and wife,
Petitioners,

VS.

UNITED AMERICAN LIFE INSURANCE COMPANY,
a Colorado corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Ninth District entered in the above cause on June 6, 1972, and rehearing denied on July 24, 1972.

OPINIONS BELOW

A written opinion was issued on June 6, 1972, is attached hereto as Appendix A and is unreported. Rehearing was denied on July 24, 1972. The Findings of Fact and Conclusions of Law of the Federal District Court is attached hereto as Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1): the Federal District Court had jurisdiction of the action under 28 U.S.C. § 1332 (Diversity of Citizenship).

QUESTIONS PRESENTED

1. Does a Federal District Court in diversity jurisdiction have power:

(a) To enter a deficiency after foreclosure decree and sale, if applicable Arizona law and the ruling of this Court in *Angel v. Bullington,* 330 U.S. 183, 191-2 withheld such deficiency.

(b) To circumvent this Arizona law and *Angel v. Bullington,* by terming the deficiency "balance due on note."

(c) To affirm the second judgment upon points never raised or argued.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Tenth Amendment;
United States Constitution, Fourteenth Amendment;
Federal Rules of Civil Procedure, 54 (b);
Federal Rules of Civil Procedure, 60 (b);
Arizona Revised Statutes, 33-725 and 727 and 10-122, Subsec. 9 (these are printed and attached hereto as Appendix C).

STATEMENT OF CASE

Petitioners are F. J. Perillo and Ruth E. Perillo, his wife, Arizona citizens. Respondent is United American Life Insurance Co., a Colorado corporation. Diamond Pin Lanes, Inc., is an Arizona corporation, herein called "Diamond".

This is an appeal from a second judgment entered in a realty foreclosure action after a sale.

The opinion of the United States Court of Appeals of the Ninth Circuit substantially sets the facts, except as shown herein.

The complaint (first count is relevant) the note and realty mortgage and respondent's ledger card (PX 9) are attached hereto as Appendix D.

REASONS FOR ALLOWANCE OF WRIT

A FEDERAL COURT CANNOT IN A DIVERSITY ACTION GRANT A DEFICIENCY UNDER ANGEL v. BULLINGTON, BECAUSE ARIZONA HAS WITHHELD SUCH RELIEF.

This Court in *Angel v. Bullington,* supra, which could have decided a similar factual situation upon the principles of *res judicata* or estoppel stated:

> "If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that state to give such a deficiency judgment."

And the Court further stated a Federal Court:

> "Cannot give that which North Carolina withheld."

The reasoning of the Court was that diversity jurisdiction must follow state law limiting deficiency judgments under the "Erie Doctrine" and the Tenth Amendment. The mortgaged land was in Virginia; here the note and mortgage was made in Arizona, the place of the land. Arizona Revised Statutes 33-725 and 727 make a mortgagor or a guarantor of its covenants only liable for a deficiency. *Kastner v. Fashions Delivery Co.* (1906) 10 Ariz. 23, 85 P. 120; *Greater Arizona Savings & Loan Assn.* (1967) 5 Ariz. App. 557, 429 P.2d 464 and *Catchpole v. Narramore* (1967) 102 Ariz. 248, 428 P.2d 105, have construed these Arizona Statutes to mean that an Arizona Court is without power to grant the deficiency sought against petitioners in this foreclosure complaint. If this Court in

Angel v. Bullington, supra, protected a North Carolina citizen from a deficiency under that state's statute similar relief should be granted to petitioners, who had a right to rely upon the Tenth Amendment, Arizona law and the aforesaid ruling of this Court in *Angel v. Bullington*, supra, that no Federal Court in Arizona would directly or indirectly enter a deficiency judgment against them after a foreclosure sale, because they were neither mortgagors nor guarantors of the mortgage covenants. These points were raised by the petitioners.

THE SECOND JUDGMENT WAS AN ILLEGAL CIRCUMVENTION OF ARIZONA'S ANTI-DEFICIENCY STATUTE[1] AND ANGEL v. BULLINGTON.

By this second judgment respondent recovered the deficiency, the difference between bid price and foreclosure judgment (Finding of Fact 26) but termed "balance due on note." This Court in *Honeyman v. Hanan*, 302 U.S. 377 (1937) ruled if New York statutes preclude deficiency judgment after foreclosure, recovery thereafter upon the bond or note for deficiency did not present any federal question, since the New York Statute barred this relief. Numerous authorities including the following were cited by petitioners, none answered, all holding if a state statute

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[1] §33-727. *Sale under execution; deficiency; order of liens; writ of possession*

A. If the mortgaged property does not sell for an amount sufficient to satisfy the judgment, an execution may be issued for the balance against the mortgagor where there has been personal service, or the defendant has appeared in the action.

prohibits a deficiency after foreclosure, recovery does not lie on the note or bond after the foreclosure secured by the mortgage or deed of trust! *Brown v. Jensen*, 41 Cal.2d 193, 250 P.2d 656, subsequent opinion 259 P.2d 425 (1953), cert. denied 74, 347 U.S. 905 (1953). In that case the holder of the note and second deed of trust was wiped out by the foreclosure of the first deed of trust, and although it could not foreclose its deed of trust, no recovery was allowed on the note, after the security had become valueless.[2] *Perpetual National Life Insurance Co. v. Brown*, 182 N.W. 2d 216 (North Dakota, 1971) holds deficiency after foreclosure and sale and deficiency on mortgage note are synonymous.

Under the common law respondent as holder and owner of note and mortgage had an election either to sue on the note first or foreclose and seek a deficiency judgment; but having sought the latter rem-

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[2]It is true that the section speaks of a deficiency judgment after sale of the security but that means after an actual sale or a situation where a sale would be an idle act, where, as here, the security has been exhausted. The deficiency judgment which cannot be obtained is still a deficiency judgment even though it may consist of the whole debt because a deficiency is nothing more than the difference between the security and the debt, or as was said in *Carr v. Cleveland Trust Co.*, Ohio.App., 74 N.E.2d 124, 128 (in dealing with a case where the sale under the first mortgage produced only enough to pay it and the effect of a two-year limitation period for obtaining a deficiency judgment on a mortgage secured debt against the holder of a note secured by a second mortgage): "But in whatever light we view the proceedings which took place, either by way of foreclosure or by separate personal judgment on the note, one fact stands out in bold relief and that is that a deficiency judgment resulted from the entire proceedings by reason whereof the plaintiffs are entitled to whatever benefits accrue from the provisions of the deficiency judgment act so-called." (quoting *Brown v. Jensen*, 259 P.2d 427.)

edy it cannot thereafter sue on note. *Lewis v. Hornback* (1925) 28 Ariz. 546, 237 P. 952 (leading case in United States). Respondent claimed (a) deficiency in the complaint, never amended, against petitioners and case never dismissed as to them (b) A.R.S. 33-725 and 727 was unconstitutional, impairing the obligations of a contract (R 507) (c) a deficiency almost up to the trial (R. 502, 3, 4). Petitioners answered the complaint and always denied the deficiency claim.

DUE PROCESS HAS BEEN VIOLATED

THE DECISION WAS BASED UPON POINTS NOT PRESENTED OR ARGUED

The Court of Appeals' opinion stated it was perplexing to hold petitioners liable and respondent should have sought reformation (p. 6), but the Court of Appeals rewrote and reformed the note by its decision. No pleading or pre-trial order presented the receivership as an issue. The appointment of a receiver to operate "a bar and restaurant" was void because it was wholly unrelated to the realty mortgage (R. 102) *Wingfoot California Homes v. Valley National Bank* (1952) 74 Ariz. 287, 248 P.2d 738. In applying for the receiver, respondent stated:

> "The revenue derived by the receiver should be enough to pay costs of the receivership and necessary expenses to keep the establishment in business." (R. 64)

The foregoing estops respondent, which never claimed petitioners liable for advances to operate a bar and bowling alley. The Court of Appeals found petition-

ers had no financial interest in the business since 1963 at which time loan was current. No chattel mortgage was executed by petitioners as security for this loan. Respondent never claimed these advances were made because of petitioners actions or it relied upon petitioners conduct.

Total advances to the receiver shown by respondent's ledger card (PX 9) did not exceed $40,000.00 including $15,248.73 for taxes. Yet this second judgment is in excess of $110,000.00. This stipulation was not an issue in the pleadings or in the pre-trial order but was for the benefit of respondent to sell and acquire the property without delay, which it did. There could not be a waiver if respondent chose to merge the note into the decree. The Courts indulge every presumption against waiver but jurisdiction can never be waived. *Curtis Pub. Co. v. Butts* (1967) 388 U.S. 130; *Aetna Ins. Co. v. Kennedy* (1939) 301 U.S. 389. After the stipulation the parties always considered deficiency as the sole remaining issue.[3]

> "Here there was one suit filed"—"thus there were no separate actions brought" (page 6, 7 of opinion).

There can only be one judgment in a foreclosure action. *Bank of Douglas v. Neel,* 30 Ariz. 375, 247 P.

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[3]Plaintiff maintains that construing the mortgage and Note together, as one mortgage loan, under the circumstances herein that (a) the Perillos are liable for any deficiency." (R. 502.) Plaintiff has not elected to sue the Perillos on the mortgage Note alone, but on the contrary has brought this action on the realty mortgage and mortgage Note together construed as one mortgage loan transaction. (R. 503.) As above stated, this is not an action on the mortgage Note alone. (R. 504.) It is unmistakably clear such deficiency cannot be limited to a mortgagor. (R. 507.)

132; *Wolffenden v. Wolffenden* (1876) 1 Ariz. 328, 25 Pac. 652. Upon appeal for the first time respondent claimed that the District Court had power to enter these two judgments under Rule 54(b) of the Federal Rules of Civil Procedure. The Court of Appeals did not rule upon this meritless argument because no 54(b) Certificate was filed and the Court of Appeals found this was one basic cause in equity to foreclose—the deficiency being ancillary. *Jamaica Savings Bank v. M. S. Investing* (1937) 274 N.Y. 215, 8 N.E. 2d 493; *Bank of Douglas v. Neel,* supra.

The following appears to be the basic conclusion for the Court of Appeals' decision:

> "Although it may appear to appellants that they are being charged for expenditures they did not agree to pay, this is not correct. The security which appellants furnished or caused to be furnished to guarantee the original loan was gradually depleted. It was depleted by an unsuccessful operation which appellants set in motion." (p. 10, 11 opinion)

No pleading, no pre-trial issue and no argument was ever made that petitioners were liable because they were the stockholders of and organized Diamond. There was no claim of (1) petitioners' non-compliance with 10-122, subsec. 9, A.R.S. (exempting stockholders and officers of Arizona corporations from corporate debts) (2) "alter ego" or "piercing corporate veil." Diamond was found to be a bona fide corporation, furnished the security, and received the proceeds of the mortgage loan (Finding of Fact 13). Holding petitioners liable upon the theory that they were sole

stockholders and formed the corporation for profit violates Arizona law, *Ferrarell v. Robinson* (1970) 11 Ariz. App. 473, 475, 465 P.2d 610, and the most elementary law of corporations:

> ". . . one of the principal purposes for legal sanctioning of a separate corporate personality is to accord stockholders an opportunity to limit their personal liability" (p. 994) *Berger v. Columbia Broadcasting System,* 453 F.2d 991 (1972) (Fifth Cir.).

Due process, the American system of fair play, was violated by this decision because every litigant is entitled to a reasonable opportunity to answer the claims made against them, and as shown herein this decision was based on points "not presented or argued by the litigants." *Letulle v. Schofield* (1940) 308 U.S. 415; *Central Union T. Co. v. Edwardsville* (1925) 269 U.S. 190. The cases cited in the opinion did not have a foreclosure decree entered.

THE LAW OF THE CASE HAD BEEN MADE BY THE DISTRICT COURT PRIOR TO ENTRY OF SECOND JUDGMENT PRECLUDING ITS ENTRY.

Respondent's foreclosure decree omitted a deficiency and failed to set forth a determination of distribution or priorities of the bid price. (Finding of Fact 28) After petitioners moved for summary motion for summary judgment, respondent sought to amend the foreclosure decree under Rule 60(b) of Federal Rules of Civil Procedure to include a deficiency and determination of priorities in bid price. (R. 497) These

motions were denied, formally or by operation of the law, on March 3, 1969. (Finding of Fact 28) *Atchison, Topeka and Santa Fe Railway Co. v. Parr* (1964) 96 Ariz. 13, 391 P.2d 575. Respondent admitted these two motions were denied (R. 827). Rule 60 (b) is a final appealable order. Moore's Federal Practice, 2d Ed. 341, Vol. 7. The denial of these motions, not appealed, established the law of this case.

NOTE AND ALL TAX ADVANCES BY MORTGAGEE WERE MERGED INTO FORECLOSURE DECREE AND NOTE WAS DISCHARGED.

The note executed by Perillos as co-makers was merged into the foreclosure decree, *Czpar v. Ginter* (1953) 76 Ariz. 12, 84, 259 P.2d 253:

> "The factual situation here discloses there was one debt evidenced by a promissory note and secured by a realty mortgage and a chattel mortgage. Suit on the note to foreclose the realty mortgage resulted in a judgment extinguishing the debt, as evidenced by the Note." (259 P.2d p. 255.)

That decision also reaffirmed election of remedies doctrine stated in *Lewis v. Hornback,* supra.

> "Defendants, having elected to foreclose the realty mortgage, were bound to exhaust the mortgaged property before they could have a deficiency judgment." See 62-520 A.C.A., 1939(1) *Lewis v. Hornback,* 28 Ariz. 546, 550 (259 P.2d p. 255.)

First National Bank v. Standard Accident Ins. Co. (1931) 38 Ariz. 1277, 297 P. 864, held all taxes advanced in a foreclosure action are merged into the judgment.

Respondent's bid price, $392,300.00, exceeded petitioners' liability under the note, which was for principal and interest. Diamond, the mortgagor, was liable for mortgage debt, a greater sum and the deficiency. This Court in *Richmond Mortgage & L. Corp. v. Wachovia Bank & T. Co.,* 300 U.S. 127, 129 (1937) sustained petitioners' position that respondent, as the lender, cannot realize from them more than they agreed to pay.

These authorities also barred respondent's attempted motions to amend decree to include distribution of proceeds and this second judgment. The note and tax advances could not be basis for recovery after the foreclosure decree and sale. This decision to hold petitioners for "balance due on note" violates due process, because neither the District Court nor the United States Court of Appeals for the Ninth Circuit ruled upon these and the other issues raised, which would have determined the lack of liability upon the part of petitioners. *St. Joseph Stock Yards Co. v. U.S.,* 298 U.S. 38.

CONCLUSION

The questions presented are substantial:

(a) The power of a Federal Court to circumvent *Angel v. Bullington,* and Arizona's anti-deficiency laws.

(b) This decision was decided upon points not raised or argued and the Court of Appeals' apparent difficulty in reaching their conclusion.

Dated, Tucson, Arizona,
August 29, 1972.

Respectfully submitted,
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SIDNEY WEISSBERGER,
Attorneys for Petitioners.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

United American Life Insurance Company, a Colorado corporation, Plaintiff-Appellee, vs. F. J. Perillo and Ruth E. Perillo, husband and wife, Defendants-Appellants.	No. 25,676

[June 6, 1972]

Appeal from the United States District Court
for the District of Arizona

Before: WRIGHT and TRASK, Circuit Judges, and BYRNE, SR.,* District Judge

TRASK, Circuit Judge:

This is an appeal from an order of the district court awarding the plaintiff a money judgment. The district court had jurisdiction of the action under 28 U.S.C. § 1332 (Diversity of Citizenship), the action being between the plaintiff, a citizen of Colorado, and

*Honorable William M. Byrne, Sr., United States Senior District Judge, Central District of California, sitting by designation.

the defendants, citizens of states other than Colorado, and involving a sum exceeding $10,000. This court has jurisdiction of the appeal under 28 U.S.C. § 1291.

FACTS

In 1961, Mr. and Mrs. F. J. Perillo (Perillos) owned a parcel of land in Tucson, Arizona, which they decided could profitably be used as the site for a bowling alley. Toward that end they formed an Arizona corporation, Diamond Pin Lanes, Inc. (Diamond), acquiring all of the stock in that corporation by conveying all of their interest in the realty to the corporation in exchange for it. Mr. Perillo became president of the corporation and his wife became its secretary.

In return for a loan from the plaintiff, United American Life Insurance Company (United), for construction of improvements, Diamond and the Perillos executed and delivered a promissory note to United in the amount of $260,000. To secure the note, Diamond simultaneously executed and delivered to United a realty mortgage dated May 5, 1961. The Perillos did sign the mortgage as corporation officers, but not in their individual capacities. At the date of the mortgage, the Perillos did not own the realty described in it; the realty was owned by Diamond. At the date of the commencement of the action, Tucson Athletic Club, Inc. (Tucson), was the owner of the realty.

On or about January 10, 1962, a new note was executed by the Perillos to reflect the fact that a $250,000

United life insurance policy on the life of Mr. Perillo, which had been assigned to United as additional security, was converted into two policies of $125,000 each on the respective lives of Mr. and Mrs. Perillo.

The note was a simple form of installment note which did not refer to the specific mortgage or by its terms obligate the makers to perform its covenants and conditions. It contained an acceleration clause, or at the option of the holder, the right to capitalize delinquent interest as principal, and a waiver of presentment for payment, or protest, and an agreement for extension of time of payment and for payment of attorney's fees.

In May 1963, the Perillos sold all of their stock in Diamond to J. Greenwell for cash and a note. At that time the mortgage loan by plaintiff was current, the balance being $246,930.69. Subsequently, Diamond and Greenwell entered into an assumption agreement under which Greenwell assumed and agreed to pay the indebtedness represented by the note and the mortgage. United was not a party to this agreement although it was notified of it.

Later, the stock in Diamond changed hands twice, but payments were not kept current and plaintiff capitalized interest, paid delinquent taxes and insurance premiums, and added the payments to the principal balance due on the promissory note. In February 1966, Diamond filed a voluntary petition for reorganization and United agreed to lend to Tucson, the then owner of the property, an additional sum of money. Those parties entered into an extension agreement on

the note on August 4, 1966, and fixed the current amount due at $334,475.52.

Defaults continued, and United brought an action in 1968, to foreclose its mortgage, joining some seventeen defendants, including the Perillos who were personally served. Thereafter, the plaintiff and Perillos entered into a stipulation wherein the issue of the Perillos' liability on the promissory note would be severed from other issues in the plaintiff's complaint and heard after the execution sale following foreclosure. The judgment in the foreclosure action contained no provision for a deficiency judgment. It granted a recovery to United against Diamond and Tucson, and each of them, in the amount of $450,704.08 plus $25,000 in attorneys' fees and $516.50 in costs.[1]

At the execution sale on October 30, 1968, the plaintiff bought the property for the sum of $392,300. This amount was applied to the amount of the judgment and the difference, plus additional costs and expenses is the subject of the present action against the Perillos.

The district court made findings of fact and conclusions of law, concluding that the Perillos, as comakers of the promissory note, were liable to plain-

[1]This sum is composed of the balance due on the principal of the promissory note, plus unpaid but capitalized interest, accrued interest, delinquent taxes, insurance premiums, advances to the Receiver during the Receivership, a payment to the Arizona State Liquor Department for a license renewal, and a payment for a title policy in 1968. "Advances to receiver" appear to be sums advanced by United to the Receiver and added by United to the principal balance due on the installment note.

tiff in the sum of $94,577.83, which was the balance unpaid as of November 1, 1968, after crediting the proceeds of the execution sale for the sum of $392,-300 against the then balance due on the note. Further adjustments of costs and expenses resulted in a final judgment in favor of United and against the Perillos in the amount of $103,698.81, plus $5,000 attorneys' fees.

The appellants' arguments here are basically:

1. The foreclosure judgment, which was based upon the note, extinguished that debt and no further action could be maintained on the note.

2. There was an election of remedies under Arizona statutory law when plaintiff chose to foreclose the mortgage, which precludes additional recovery on the note.

3. The extension agreement between plaintiff and Tucson constituted a material alteration of the note which discharged appellants who were then in the position of sureties.

4. The liability of the Perillos under the note did not extend to the charges contained in the mortgage.

The first contention of appellants is that the court "had no power" to proceed under the stipulation to determine the Perillos' liability. They argue that once the decree of foreclosure was entered the only authority remaining in the court was to determine the existence of a deficiency judgment. Neither the cases cited nor the statutes referred to support appellants' argument.

The foreclosure proceeding is one to apply a security to a debt. If it is insufficient, the creditor may pursue any other legal means available to make himself whole. Here, the plaintiff's complaint asserted a claim against the Perillos on the promissory note as well as a claim against several parties for foreclosure of the mortgage. The stipulation simply established the time at which this claim of the Perillos' liability on the note would be tried.

The second contention made by appellants is that the decision of United to foreclose the mortgage constituted an election under Ariz. Rev. Stat. § 33-722, which precluded additional recovery on the note.[2]

The policy underlying the statute, and similar statutes elsewhere, appears to be that several actions should not be filed to determine the rights of the creditor where a determination may be made in one. *Arizona Title Ins. & Trust Co. v. Kelly,* 11 Ariz. App. 254, 462 P.2d 838, 839 (1970). It seems clear from the decisions in Arizona that the statute applies only if separate actions have been brought and both are pending simultaneously. *Smith v. Mangels,* 73 Ariz. 203, 240 P.2d 168, 170 (1952); *Arizona Title Ins. & Trust Co. v. Kelly, supra.*

Here, there was but one suit filed. Under Count One, against Diamond, the Perillos, Greenwell and Tucson, it sought recovery of all sums due on the in-

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[2]Ariz. Rev. Stat. § 33-722 provides as follows:

"If separate actions are brought on the debt and to foreclose the mortgage given to secure it, the plaintiff shall elect which to prosecute and the other shall be dismissed."

stallment note, foreclosure of the real estate mortgage, and a deficiency judgment. The Perillos answered denying liability and asserting numerous affirmative defenses. It was at this point in the lawsuit that plaintiff and the Perillos entered into a formal stipulation severing the question of the personal liability of the Perillos until after the execution sale following the decree of foreclosure.

The plaintiff obtained a default judgment against Diamond and a summary judgment against Tucson, in the sum of $477,220.58, and a decree foreclosing the realty mortgage. This decree did not provide for any deficiency judgment. It was thereafter, and pursuant to Perillos' own stipulation, that a hearing was held on their personal liability. Thus, there were no "separate actions" brought, and Ariz. Rev. Stat. § 33-722 has no application on the facts disclosed here.

Another argument of the appellants is that the extension agreement between United and Tucson constituted a material alteration of the note and discharged appellants from their obligation on the note. The Perillos became sureties with Tucson as the primary debtor, it is urged, when Tucson assumed payment of the mortgage. Extension of the time of payment by United to Tucson thus released appellants, or constituted a novation which had the same effect.

Appellants cite numerous authorities in support of their legal position. All of them in point on the fact situation confronting us are from jurisdictions other than Arizona. Here, we must look to the decisions of the courts of Arizona.

Among its conclusions of law, the district court determined that the extension agreement did not constitute either a novation or a material alteration so that it discharged the Perillos from their liability. The court relied upon *Shiflet v. Marley,* 58 Ariz. 231, 118 P.2d 1107 (1941); *Young v. Carr,* 44 Ariz. 223, 36 P.2d 555 (1934); and *Mortgage Guarantee Co. v. Chotiner,* 8 Cal.2d 110, 64 P.2d 138 (1956).

In *Young v. Carr, supra,* the Arizona Supreme Court held that an accommodation signer of a promissory note becomes a maker and is obligated to pay regardless of action taken against a co-maker; and that even though he might be a surety as between himself and his co-maker, yet as between himself and the payee, he is a maker and is primarily liable.

In *Shiflet v. Marley, supra,* the creditor made a loan which was evidenced by a promissory note and secured by a mortgage on real property. The debtor sold subject to the mortgage and the grantee entered into an extension agreement with the creditor and assumed the payment of the note and mortgage. The original borrower, who had neither known about nor consented to the extension agreement, contended that it released him from his original obligation on the note. The court held that it did not. It affirmed *Young v. Carr, supra,* stating that one who is primarily liable on a note was not released by an extension of time given to another who was also primarily liable. It also held that there was no novation unless the agreement was one between three parties, the debtor, the creditor and the intended new debtor, wherein all agreed that

the liability of the new debtor was substituted for that of the original debtor and the original debt extinguished. An examination of the extension agreement in the present case clearly shows there was no release of the original debt and substitution of the new. We agree with the conclusion of law of the trial court.

The perplexing problem posed in this case is created by the fact that the Perillos signed the promissory note but did not sign the mortgage. The note contained no provision obligating the makers of the note to pay the mortgage obligations. There was no claim to reform the note or the mortgage to put the Perillos in the position of obligors of the covenants in the mortgage. Both parties agreed that the Perillos did not sign the mortgage in their individual capacities and the court so found. The court made no finding either of fact or of law that appellants were mortgagors, or obligated upon the mortgage covenants.

The mortgage has the usual covenants in such an instrument obligating the mortgagor to pay all taxes, assessments and charges upon the real estate, to insure at his own cost, and keep insured against damage by fire or other hazards, the buildings on the premises, to keep all improvements in good repair and similar provisions. This instrument was executed only by Diamond, the owner of the real property mortgaged, but at the instance of the Perillos, who were then the sole owners of all of the issued and outstanding common stock. The Perillos sold all of their stock in the corporation in May 1963, and from that date to date of foreclosure had no financial interest in

either the land or the corporations operating the bowling alley constructed on it. The unpaid balance on the note at the time they sold their stock was $246,960.69, and the payments on the loan were current.

Thereafter, the plaintiff as mortgagee charged not only unpaid principal installments and unpaid interest against the balance due on the note, but it also charged all advances it made for payments because of the delinquency of the mortgagor, i.e., taxes and insurance. In addition, it charged against the note advances for sums for which there is no provision made in the mortgage such as advances for a liquor license renewal and loans which it made to the Receiver of the bowling alley which was operating the premises.

In each instance an account and report was filed on behalf of the Receiver detailing his expenditures, and a petition for approval together with a request for approval of any unusual expenditures were also filed. No objection was made by the Perillos either to the appointment of the Receiver or to any of the expenditures in the accounts and reports, although copies of all documents were served on them. Upon sale of the property, the money borrowed by the Receiver under order of the court for payment of taxes, insurance and operation of the Receivership were deducted and the balance credited to the sums due on the note.

Although it may appear to appellants that they are being charged for expenditures they did not agree to

pay, this is not correct. The security which appellants furnished or caused to be furnished to guarantee the original loan was gradually depleted. It was depleted by an unsuccessful business operation which appellants set in motion. When the security was finally sold, it simply did not produce enough money, after expenditures, to pay the note. We find nothing in the record nor in the arguments and authorities produced by appellants which can merit any alteration in the judgment and it is therefore affirmed.

Appendix B

In the United States District Court
for the District of Arizona

No. Civil-2400 Tucson

United American Life Insurance Company, a Colorado Corporation,
Plaintiff,

vs.

F. J. Perillo and Ruth E. Perillo, husband and wife, Tucson Athletic Club, Inc., an Arizona Corporation, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been tried before the court, sitting without a jury, and all of the evidence in the case having been taken, counsel for the parties having filed briefs, the Court now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiff, United American Life Insurance Company, is and was at all times material herein a corporation organized and existing under the laws of

the State of Colorado, with its principal place of business at Denver, Colorado. Defendants F. J. Perillo and Ruth E. Perillo, husband and wife (sometimes hereinafter referred to as "Perillos"), are citizens of the State of Arizona. No other defendant herein is a citizen of the State of Colorado.

2. The amount in controversy between the parties herein exceeds the sum of $10,000, exclusive of interest and costs.

3. In 1960, defendants Perillo owned real property at or near the northwest corner of the intersection of Kolb and 22nd Streets, in Tucson, Arizona. In the latter six months of 1960, F. J. Perillo undertook a study of possible uses of some of his land in that area and concluded, after investigation and a Brunswick feasibility study, that a new bowling alley would be feasible and profitable. At this time, F. J. Perillo was well acquainted with Howard Strauss, both socially and because of various business dealings they had together. Howard Strauss was then the general agent of plaintiff in charge of the Tucson office and F. J. Perillo discussed with Strauss his idea of the construction of a bowling alley on several occasions during the latter half of 1960.

4. Shortly after January 1, 1961, F. J. Perillo . . . discussed with Strauss and Mel Fine, then Superintendent of Agents of plaintiff for Colorado, New Mexico, Arizona and Nevada, the possibility of plaintiff making a $300,000 loan to a corporation which Perillo and his wife would form and own, to con-

struct and operate the bowling alley. F. J. Perillo informed Strauss and Fine that he was interested in a $300,000 permanent loan and that he felt sure he could negotiate an interim construction loan. Perillo, Strauss and Fine discussed life insurance on the life of F. J. Perillo, which insurance, after issue, would be assigned to the interim lender, and then to the permanent lender, as security for the loan, in addition to a promissory note and first realty mortgage. Perillo requested Fine, who was to visit the home office of plaintiff in Denver, Colorado, within the next few days, to submit to plaintiff Perillo's proposal for a permanent loan to be secured by a first realty mortgage and by the assignment of an insurance policy on the life of F. J. Perillo, which Perillo would take out with plaintiff company. Perillo delivered to Fine a plot plan of the project, an architect's estimate of the construction costs, and a financial statement. Fine, shortly thereafter, presented Perillo's oral proposal to Lloyd Borger, Treasurer of plaintiff company, in charge of the mortgage loan department.

5. On or about January 18, 1961, F. J. Perillo sent a letter to Howard Strauss giving estimates of costs of construction, a Brunswick feasibility study, and a financial statement of F. J. Perillo. (DX "7"). On January 19, 1961, Howard Strauss forwarded a copy of that letter to Borger at the home office of plaintiff.

6. On or about March 7, 1961, F. J. Perillo signed an application for a $250,000, twenty pay life insurance policy with plaintiff, naming his estate as prin-

cipal beneficiary. This application was forwarded to the home office, together with medical examiner's reports dated March 7, 1961 and March 8, 1961. On or about March 9, 1961, Borger met with Perillo and Strauss in Tucson, Arizona, and inspected the property where the proposed construction was to be done.

7. On or about March 17, 1961, Borger received from The Arizona Bank a letter indicating their approval of an interim loan of $260,000, subject to the Bank's approval of plaintiff's "take-out" commitment letter and an assignment of the $250,000 life insurance policy on the life of F. J. Perillo. On or about March 23, 1961, Borger sent to Perillo a letter on behalf of plaintiff, committing plaintiff to loan $260,000 on a bowling alley to be known as "Diamond Pin Lanes, Inc.", to be secured by a first realty mortgage on the completed premises and by assignment of a $250,000 life insurance policy on the life of F. J. Perillo. A commitment fee of $2,600 was also required by the terms of said letter. (DX "8"). On or about March 24, 1961, Borger received from The Arizona Bank a letter indicating the bank's loan would be to Diamond Pin Lanes, Inc., with F. J. Perillo and Ruth E. Perillo to give personal guarantees.

8. On or about March 29, 1961, Borger sent to Strauss the $250,000 policy of insurance on the life of F. J. Perillo, which policy called for a premium payable monthly in the amount of $1,042.50. On or about March 31, 1961, Borger received from Strauss a letter enclosing a check of F. J. Perillo for $2,600 as and for the commitment fee.

9. By collateral assignment dated March 31, 1961, executed by F. J. Perillo, the $250,000 policy of life insurance on the life of F. J. Perillo was assigned to The Arizona Bank as additional security for their interim construction loan and, on the same date, Borger wrote a letter to The Arizona Bank acknowledging the commitment fee and confirming that plaintiff's commitment was to Diamond Pin Lanes, Inc. (DX "10").

10. On or about May 5, 1961, F. J. Perillo and Ruth E. Perillo, husband and wife, and Diamond Pin Lanes, Inc., an Arizona corporation, executed and delivered to plaintiff a promissory note dated May 5, 1961, in the principal amount of $260,000. (PX "1"). Simultaneously therewith, and to secure said promissory note, Diamond Pin Lanes, Inc., executed and delivered to plaintiff a realty mortgage dated May 5, 1961. (PX "2"). Shortly before the date of these instruments the Perillos had formed the Arizona corporation known as Diamond Pin Lanes, Inc., and on May 5, 1961, were the sole owners of the stock of said corporation. F. J. Perillo was president and Ruth E. Perillo secretary of the corporation. *The Perillos as individuals were co-makers of the promissory note, but did not sign the mortgage in their individual capacity. They did sign the mortgage as corporate officers of Diamond Pin Lanes, Inc.* The joinder of the defendants Perillo as co-makers of the promissory note was a free and voluntary act on their part and was not in any manner coerced or compelled by plaintiff.

11. The requirement by plaintiff that defendants Perillo furnish as security, in addition to the realty mortgage, the $250,000 life insurance policy on F. J. Perillo was made by plaintiff as a matter of business judgment that such further security was necessary in order to protect plaintiff's interest. The requirement was not made in order to enable plaintiff to obtain interest at a rate exceeding the highest legal rate; nor was it made as a device to cover usury. As to the commitment fee charged by plaintiff—1% of the loan —the same was reasonable in light of the fact that plaintiff had some expenses in connection with making the loan and the further fact that the loan commitment required plaintiff about April 1, 1961, to so restrict more than a quarter million dollars of its funds that it could be certain to have the same available in January, 1962, to "take out" the interim lender.

12. By written application of F. J. Perillo to plaintiff, dated July 3, 1961, consented to by The Arizona Bank, the face amount of the twenty pay life insurance policy on the life of F. J. Perillo was decreased to $125,000, the monthly premium being reduced to $490.94. Pursuant to an application by Ruth E. Perillo dated May 31, 1961, and evidence of insurability, a twenty pay life insurance policy on her life was issued with effective date of July 10, 1961. This policy called for monthly premiums in the amount of $292.92. This policy was also assigned to The Arizona Bank on or about July 13, 1961, as additional security for the interim construction loan.

13. On or about January 4, 1962, plaintiff received from Arizona Land Title and Trust Company the original executed promissory note with the original executed realty mortgage, each bearing date of May 5, 1961. On or about January 10, 1962, Borger, on behalf of plaintiff, wrote Arizona Land Title and Trust Company and enclosed therein a new promissory note in the amount of $260,000, which reflected thereon the assignment of two policies of insurance as collateral security. On or about January 25, 1962, plaintiff received from Arizona Land Title and Trust Company the re-executed original promissory note in the amount of $260,000, bearing date of May 5, 1961, executed by Diamond Pin Lanes, Inc., and by F. J. Perillo and Ruth E. Perillo, as individuals. On or about January 29, 1962, plaintiff forwarded to Arizona Land Title and Trust Company plaintiff's check in the amount of $260,000, dated January 29, 1962, payable to Arizona Land Title and Trust Company, said check being for the benefit of Diamond Pin Lanes, Inc., to pay off the interim construction loan.

14. On or about January 10, 1963, Perillo sent to Strauss a letter requesting that the policies of insurance on the life of F. J. Perillo and Ruth E. Perillo be converted to term policies. Subsequently, and on or about March 20, 1963, the policies were converted to term policies, and the accumulated cash value used to pre-pay premiums for the term policies. Up to that time the Perillos had paid approximately $15,000 for premiums on the policy on the life of F. J. Perillo and about $5,580 for premiums on the policy on the

life of Ruth E. Perillo. These policies lapsed on March 15, 1966, for failure to pay premiums.

15. *Around the end of May, 1963, the Perillos sold all of their stock in Diamond Pin Lanes, Inc., to Jerome Greenwell for $65,000, $5,000 cash and a promissory note in the amount of $60,000. At the time of the sale, the mortgage loan to plaintiff was current, the balance being $246,930.69.* Subsequently, Diamond Pin Lanes, Inc., and Jerome Greenwell entered into an assumption agreement (PX "7"), under which Greenwell assumed and agreed to pay the mortgage loan. Plaintiff was not a party to this agreement and did not at any time accept Greenwell as the debtor in place of the defendants Perillo or agree to release or discharge the Perillos from their liabilities as co-makers of the mortgage note.

16. Greenwell, approximately one year later, sold all of the stock of Diamond Pin Lanes, Inc., to George Prince, who assumed Greenwell's obligation to Perillo on the $60,000 promissory note. Approximately one year later, Prince sold the stock of Diamond Pin Lanes, Inc., to defendant Kitay, who assumed and agreed to pay Prince's obligation on the $60,000 promissory note held by Perillo. Kitay then took over the management and operation of the bowling alley. From and after the time F. J. Perillo sold his interest in the stock in Diamond Pin Lanes, Inc., payments of principal and interest on the $260,000 promissory note and realty mortgage were not made in accordance with the payment schedule and, on various occasions, plaintiff capitalized interest, paid delinquent taxes

and insurance premiums, and added the same to the balance due on the mortgage indebtedness. No payments of principal were received by Perillo on the $60,000 promissory note from Greenwell, Prince, or Kitay, Perillo agreeing on various occasions to accept payments of interest only.

17. On or about February 1, 1966, the officers of Diamond Pin Lanes, Inc., filed a voluntary petition in this Court under Chapter 11 of the Bankruptcy Act, for a reorganization of said company. The bowling alley was run by a receiver appointed by the referee in bankruptcy until on or about August 5, 1966, at which time title to the real property and improvements thereon, constituting the bowling alley, was conveyed to a newly formed Arizona corporation, Tucson Athletic Club, Inc., which corporation had been formed by defendants Kitay and Rubinstein. Prior thereto, negotiations had been conducted by defendants Kitay, Rubinstein, and Tucson Athletic Club, Inc., with plaintiff and with F. J. Perillo to allow Tucson Athletic Club, Inc., to take over the bowling alley. Plaintiff agreed to loan some $22,500 to Tucson Athletic Club, Inc., on the terms and conditions outlined in a commitment for loan agreement (PX "3"), the principal provisions of which provided for securing the $22,500 loan by a first realty mortgage to plaintiff on a 47 foot strip of land connecting the bowling alley with 22nd Street, and *an extension agreement (PX "5") which expressly fixed the sum of $334,475.52 as the amount of the indebtedness on the $260,000 promissory note held by plain-*

tiff, as of September 1, 1966. Perillo agreed with Tucson Athletic Club, Inc., and Kitay and Rubinstein to sell the 47 foot strip to Tucson Athletic Club, Inc., for the sum of $45,000, payment to be made by two promissory notes, one in the amount of $20,000 and the other in the amount of $25,000, each secured by realty mortgages on said 47 foot strip, which would be subject to the first realty mortgage to plaintiff. In this transaction, Perillo also obtained a first chattel mortgage on certain chattels located in the bowling alley and plaintiff obtained a chattel mortgage on all the chattels located in the bowling alley, subject to Perillo's first chattel mortgage on certain of the chattels, and subject, also, to prior liens of the other creditors. At the time of these negotiations, F. J. Perillo was aware of the amount owing on the $260,000 note and mortgage.

18. The extension agreement entered into between plaintiff and Tucson Athletic Club, Inc., referred to in Finding of Fact 17 (PX "5"), was entered into by plaintiff in reliance upon the provision of the $260,000 promissory note that "The makers . . . hereof . . . agree to any extension of time of payment and partial payments before, at, or after maturity . . .". The agreement did not extend beyond February 1, 1977, the time for any payment due under the note, but provided that payments in default prior to October 1, 1966, might be made at any time prior to February 1, 1977. In entering into the extension agreement, plaintiff did not accept or intend to accept Tucson Athletic Club, Inc., as its debtor in place of defendants Perillo;

neither did plaintiff intend to waive any of its rights against defendants Perillo nor to lease or discharge defendants Perillo from their liabilities as co-makers of the mortgage note.

19. On or about August 6, 1966, Tucson Athletic Club, Inc., became the owner of the real property on which the bowling alley was located and the 47 foot strip, and commenced operating the bowling alley. The obligations becoming due from Tucson Athletic Club, Inc., to plaintiff and defendants Perillo during the latter part of 1966 and during 1967 for the most part were not paid in spite of constant efforts by plaintiff and defendants Perillo to obtain payment. On account of the defaults of Tucson Athletic Club, Inc., and the failure to pay real property taxes for the second half of 1965, all of 1966 and the first half of 1967 (paid by plaintiff on January 2, 1968 in the total sum of $25,406.25), plaintiff filed this action on January 26, 1968, for foreclosure of its real property and chattel mortgages. *Plaintiff's prayer for relief under Count I of the complaint was for a judgment on the $260,000 promissory note against Tucson Athletic Club, Inc., Diamond Pin Lanes, Inc., F. J. Perillo and Ruth E. Perillo, husband and wife, and Jerome C. Greenwell and Garnett E. Greenwell, husband and wife, for the total principal sum of $365,609.54, plus interest thereon at the rate of 6¾% per annum from January 1, 1968, until paid, for the sum of $25,406.05, plus interest thereon at the rate of 8% per annum from January 2, 1968, until paid, for monies advanced by plaintiff to pay said taxes, for the sum of $1,105*

plus interest thereon at the rate of 8% per annum from January 12, 1968, for insurance premium paid by plaintiff, for attorneys' fees and for such other sums as plaintiff might be compelled to advance from time to time to protect the mortgaged premises. Plaintiff also prayed for foreclosure of its first realty mortgage dated May 5, 1961, securing the $260,000 promissory note, and for a deficiency judgment against all defendants. No amount sought to be recovered by plaintiff's complaint had become due to plaintiff prior to March 1, 1964.

20. Simultaneously with the filing of the complaint, plaintiff filed a petition for appointment of a receiver and, after hearing on said petition, the Court appointed Homer R. Majeske to be receiver. Majeske, after posting bond, took possession of the premises on February 8, 1968, and remained in possession of said premises and operated the same as a bowling alley until discharged on September 22, 1969. Pursuant to Court orders, during the first few months of the receivership, necessary advances of monies were made by plaintiff to the receiver in order for the receiver to preserve the mortgage security and to continue the operation of the bowling alley. The Perillos were given notice of all proceedings had and taken in the receivership, but never objected to any advances sought and obtained by the receiver from the plaintiff and approved by this Court.

21. At the time plaintiff commenced this action, on January 26, 1968, and at all times thereafter,

defendants Diamond Pin Lanes, Inc., and Tucson Athletic Club, Inc., were insolvent.

22. The Perillos were personally served with process herein and filed herein cross-claims against Rubinstein, Kitay, and Tucson Athletic Club, Inc., to foreclose their realty mortgages and chattel mortgage hereinafter described in Finding 17.

23. On or about July 30, 1968, the Perillos moved for summary judgment on their cross-claim against defendants Rubinstein, Kitay and Tucson Athletic Club, Inc. On or about August 1, 1968, plaintiff moved for entry of default judgment against defendants Kitay and Tucson Athletic Club., Inc., on Count I of the complaint, and for a judgment of foreclosure on its realty mortgage securing the $260,000 promissory note. On August 12, 1968, plaintiff, defendants Perillo, and defendants Rubinstein, through their respective counsel, entered into a stipulation of record in this case, wherein the issue of alleged liability of defendants Perillo on the $260,000 promissory note would be severed from other issues in plaintiff's complaint and heard at a later date after execution sales following the foreclosure of plaintiff's mortgages on the real and personal property described in Counts I and II of plaintiff's complaint. On September 3, 1968, the Court heard plaintiff's motion for entry of default judgment against defendants Diamond Pin Lanes, Inc., and Tucson Athletic Club, Inc., and defendants Perillo's motion for judgment on their cross-claim against defendants Rubinstein, Kitay, and Tucson

Athletic Club, Inc., and granted judgment as prayed for by both parties. The written judgment, dated September 11, 1968, provided, among other things, as follows:

A. Plaintiff's claims against defendants Perillo were severed from plaintiff's claim against the other defendants, and the issue of the liability of defendants Perillo to plaintiff was continued for determination at a later date, after execution sales were held pursuant to the judgment.

B. *Plaintiff was awarded judgment under Count I of the complaint against Diamond Pin Lanes, Inc., and the Tucson Athletic Club, Inc., and each of them, in the amount of $450,704.08, plus attorneys' fees in the amount of $25,000, and costs in the amount of $516.50, said sums to bear interest from date of judgment at the rate of 8% per annum.*

C. The sums and amounts set forth above were declared to be first liens upon the real property on which the bowling alley was located, a first lien upon certain personal property on the premises, and a second lien on certain other personal property on the premises, the latter being subject to a first lien held by defendants Perillo, which first lien was also foreclosed in said judgment.

D. Plaintiff's realty mortgage securing the $260,000 promissory note was ordered foreclosed, as were the chattel mortgages held by plaintiff

and by the defendants Perillo, and the first mortgage held by plaintiff on the 47 foot strip. The judgment directed that a special execution be issued to the United States Marshal commanding him to sell the real and personal property described in the real and chattel mortgages and apply the proceeds to the money judgments awarded to plaintiff and defendants Perillo.

The judgment contained no provision for a deficiency judgment against defendants Diamond Pin Lanes, Inc., and Tucson Athletic Club, Inc., or either of them, in the event the amounts realized by plaintiff from the special execution sales was insufficient to satisfy the amounts adjudged to plaintiff.

24. On September 24, 1968, a special execution was issued by the clerk of this Court to the United States Marshal, directing him to sell the personal and real property described in the judgment and, on September 26, 1968, the United States Marshal's Notice of Sale of Real and Personal Property was issued, posted, and published according to law, fixing October 30, 1968, as the date of the sale of the real and personal property described in said Notice.

25. On or about August 26, 1968, defendants Perillo moved the Court for an order fixing an upset price at which the real property on which the bowling alley was located could be sold, or, in the alternative, that the Court appoint an appraiser to determine a fair and adequate price for said property. After a hearing on September 3, 1968, the Court denied the motion.

26. *On October 30, 1968, the Marshal conducted the sale of the real and personal property as directed by the special execution and plaintiff, being the highest bidder therefor, purchased for $1,000 the personal property covered by plaintiff's chattel mortgage and purchased for the sum of $392,300 the real property covered by its realty mortgage.* Plaintiff's bid for the real property was made in good faith and represented the opinion of its officers as to what plaintiff would be able to realize from the property if plaintiff had it for sale. In fact, the bid was fairly close to the fair market value of the property on October 30, 1968. The costs and expenses of the execution sale were paid by plaintiff to the Marshal and the balance of plaintiff's bid, i.e., the sum of $386,828.12, was applied upon plaintiff's judgment, leaving a balance unpaid as of November 1, 1968, of $94,577.83.

27. Plaintiff insists that in crediting the proceeds of the Marshal's special execution sale to the payment of its judgment it may properly utilize the following priorities, viz: (a) Court costs; (b) expenses of preserving its security consisting of advances to the Court appointed receiver, advances for taxes, and advances for fire insurance premiums; (c) attorneys' fees on foreclosure fixed and allowed by this Court; and (d) interest and principal on the mortgage note. When so credited and applied, there remains a balance due on the note, as of November 8, 1968, of $94,577.83; and plaintiff seeks judgment in this amount, with interest thereon at the rate of 8% per annum from November 8, 1968, to the date of judg-

ment. Plaintiff seeks, also, judgment for additional attorneys' fees for services rendered herein by its attorneys, asserting that the sum of $18,000 is a reasonable sum to be allowed for such fees. In this regard, the Court fixed and allowed $25,000 attorneys' fees upon entry of the foreclosure decree with the understanding and intent that the same would cover some services rendered in this case by plaintiff's attorneys after the date of such decree. However, plaintiff's attorneys have been required to do substantially more work in the case than was contemplated by the Court at the time the $25,000 attorneys' fees were allowed.

28. *On March 3, 1969, the Court denied a petition filed by plaintiff for an amendment to the judgment and decree of foreclosure, which amendment would have added a provision that plaintiff have a deficiency judgment in the event the proceeds from the execution sale failed to completely satisfy the amounts adjudged to plaintiff in the decree.*

Conclusions of Law

1. This court has jurisdiction of the parties to this action and of the subject matter of the action. 28 USC § 1332.

2. All issues herein between plaintiff and defendants Perillo are governed and controlled by Arizona law.

3. Defendants Perillo have not established their defense that they were acting under duress when they

signed the $260,000 promissory note as co-makers with Diamond Pin Lanes, Inc.

4. Defendants Perillo have not established their defense of usury.

5. The evidence presented in the case does not establish any conduct of plaintiff with respect to the time of instituting its foreclosure action which constitutes negligence, or delay, or laches, justifying the barring of plaintiff's claim against defendants Perillo. The evidence further fails to establish any conduct on the part of plaintiff so inequitable toward defendants Perillo as to estop plaintiff from prosecuting its claim against them.

6. Plaintiff's bid of $392,300 for the real property sold at the execution sale herein was adequate consideration for said real property.

7. The execution of the assumption agreement by Diamond Pin Lanes, Inc., and Jerome C. Greenwell, described in Finding of Fact 15, supra, did not amount to a novation and did not release or discharge defendants Perillo from liability on the $260,000 promissory note. *Shifet v. Morley,* 58 Ariz. 231, 118 P.2d 1107.

8. The execution by plaintiff and defendant Tucson Athletic Club, Inc., of the extension agreement described in Finding of Fact 17, supra, did not amount to a novation or a material alteration of the $260,000 promissory note and did not release or discharge defendants Perillo from their liability on the $260,000 promissory note. *Young v. Carr,* 44 Ariz.

223, 36 P.2d 555; *Shiflet v. Morley,* 58 Ariz. 231, 118 P.2d 1107; *Mortgage Guarantee Co. v. Chotiner,* 8 Cal. 2d 110, 64 P.2d 138, 108 ALR 1080.

9. Plaintiff's claim against defendants Perillo is not barred or defeated by the provisions of § 33-722, nor by the provisions of § 33-725 nor by the provisions of § 33-727, Arizona Revised Statutes; nor is the claim barred by plaintiff's failure to insist upon a deficiency judgment against the insolvent defendants, Diamond Pin Lanes, Inc., and Tucson Athletic Club, Inc.

10. The judgment and decree of foreclosure rendered herein on September 11, 1968, in favor of plaintiff and against defendants Tucson Athletic Club, Inc., and Diamond Pin Lanes, Inc., in no manner released or discharged defendants Perillo from their liability to plaintiff on the $260,000 promissory note.

11. Plaintiff's claim against defendants Perillo is based upon an indebtedness evidenced by a writing signed by defendants Perillo, i.e., a promissory note, and the Arizona Statute of Frauds is inapplicable to plaintiff's claim.

12. Plaintiff's claim is not barred by any Arizona statute of limitations.

13. Plaintiff's failure to comply with the provisions of § 10-485B, Arizona Revised Statutes, does not bar plaintiff from prosecuting its claim against defendants Perillo on the $260,000 promissory note.

14. The realty mortgage (PX "2") securing the $260,000 note involved herein provides that it shall

secure the claim of plaintiff to costs, attorneys' fees, and all expenses which plaintiff shall be required to make for preserving its security. Further, the expenditures by plaintiff for preserving its security and for realizing upon such security has resulted, pro tanto, in a reduction of the indebtedness to plaintiff of defendants Perillo as co-maker of the $260,000 note. Accordingly, plaintiff is entitled to credit and to apply the proceeds of the Marshal's foreclosure sale in the manner outlined in Finding of Fact 27.

15. There is now due, owing and unpaid to plaintiff from defendants Perillo, as co-makers of the promissory note sued upon herein, the sum of $94,577.83, with interest thereon at 8% per annum from November 8, 1968, and plaintiff is entitled to judgment for that amount.

16. The sum of $5,000 is a reasonable sum to be allowed to plaintiff on account of its attorneys' fees herein and plaintiff is entitled to judgment for that sum.

Dated: January 14, 1970.

James A. Walsh
United States District Judge

Appendix C

ARIZONA REVISED STATUTES

§ 33-725. *Judgment of foreclosure; contents; sale of Property*

A. When a mortgage or deed of trust is foreclosed, the court shall give judgment for the entire amount determined due, and shall direct the mortgaged property, or as much thereof as is necessary to satisfy the judgment, to be sold.

B. Judgments for the foreclosure of mortgages and other liens shall provide that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject to lien, and, except in judgments against executors, administrators and guardians, that a special execution issue to the sheriff or any constable of the county where the property is located, directing him to seize and sell the property as under execution, in satisfaction of the judgment. If the property cannot be found, or if the proceeds of the sale are insufficient to satisfy the judgment, then to make the money or any balance thereof remaining unpaid, out of any other property of the defendant except as provided in §§ 33-729 and 33-730.

C. If the debt for which the lien is held is not all due, as soon as enough of the property is sold to pay the amount due, with costs, the sale shall cease, and afterward as often as more becomes due for principal and interest, the court may, on motion, order more property sold. If the property cannot be sold in portions without injury to the parties, the whole may be ordered sold in the first instance and the entire debt

and costs paid, allowing a rebate of interest where proper. As amended Laws 1971, Ch. 182, § 1.

§ 33-727. *Sale under execution; deficiency; order of liens; writ of possession.*

A. Except as provided in §§ 33-729 and 33-730, if the mortgaged property does not sell for an amount sufficient to satisfy the judgment, an execution may be issued for the balance against the mortgagor where there has been personal service, or the defendant has appeared in the action.

B. If there are other liens on the property sold, or other payments secured by the same mortgage, they shall be paid in their order, and if the money secured by any such lien is not yet due, a rebate of interest, to be ascertained by the court, shall be made by the holder, or his lien on such property will be postponed to those of a junior date, and if there are no other liens the balance shall be paid to the mortgagor. If redemption is not made and the mortgagor or his assigns refuse, after expiration of the time for redemption, to deliver possession of the foreclosed property, the court shall order a writ of possession issued placing the purchaser or his assigns in possession. As amended Laws 1971, Ch. 182, § 2.

§ 10-22 • • •

9. Whether private property of the shareholders is to be exempt from corporate debts, and unless so exempted, the shareholders shall be liable for the debts of the corporation in the proportion their stock bears to the whole capital stock. As amended Laws 1958, Ch. 22, § 1; Laws 1962, Ch. 105, § 1.

Appendix D

In The United States District Court
For The District of Arizona

No. Civ. 2400 — Tucson

United American Life Insurance Company, a Colorado corporation,

Plaintiff,

vs.

Tucson Athletic Club, Inc., an Arizona corporation; Diamond Pin Lanes, Inc., an Arizona corporation; F. J. Perillo and Ruth E. Perillo, husband and wife; Jerome C. Greenwell and Garnett E. Greenwell, husband and wife; Jack Gumbin and Louise Gumbin, husband and wife; Murrey & Sons Co., Inc., a corporation; General Electric Credit Corporation, a corporation; Marvin A. Kitay; Reuben R. Rubinstein and Irma Rubinstein, husband and wife; Atlas products, Inc., an Iowa corporation; Brunswick Corporation, a Delaware corporation; Oracle Road Lumber Company, an Arizona corporation; State of Arizona, ex rel Arizona State Tax Commission; John Doe and Jane Doe, husband and wife, 1 through 10; Coe Corporation 1 through 5,

Defendants.

[Filed January 26, 1968]

COMPLAINT FOR FORECLOSURE OF REAL ESTATE AND CHATTEL MORTGAGES

Comes now the above named plaintiff and for its cause of action against the above named defendants alleges as follows:

COUNT ONE

I.

Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Colorado, is a citizen of said State and has its principal place of business in said State. Defendants Diamond Pin Lanes, Inc. and Tucson Athletic Club, Inc. are corporations organized and existing under and by virtue of the laws of the State of Arizona, are citizens of said State and have their principal places of business in said State. Defendants F. J. Perillo and Ruth E. Perillo (hereinafter sometimes referred to as defendants Perillo) are husband and wife, citizens of the State of Arizona and residents of Tucson, Arizona. Upon information and belief defendants Jerome C. Greenwell and Garnett E. Greenwell (hereinafter sometimes referred to as defendants Greenwell) are husband and wife and citizens and residents of the State of Illinois. Upon information and belief defendants Jack Gumbin and Louise Gumbin (hereinafter sometimes referred to as defendants Gumbin) are husband and wife and citizens of the State of Florida. On information and belief, defendant Murrey & Sons, Inc. is a corporation organized and existing under and by virtue of the laws of California, a citizen of said State and has its principal place of business in said State. Upon information and belief defendant General Electric Credit Corporation is a corporation organized and existing under and by virtue of the laws of the State of New York, a citizen of said State and has its principal place of business in said State.

Defendant Marvin A. Kitay (hereinafter referred to as defendant Kitay) is a citizen of the State of Arizona, a resident of Tucson, Arizona, and is sometimes known as M. A. Kitay, Mike Kitay, Michael A. Kitay, and Mike A. Kitay. Defendants Reuben R. Rubinstein and Irma Rubinstein (hereinafter referred to as defendants Rubinstein) are husband and wife, citizens of the State of Arizona and residents of Tucson, Arizona. Defendant Atlas Products, Inc. is a corporation organized and existing under and by virtue of the laws of the State of Iowa, is a citizen of said State and has its principal place of business in said State. Defendant Brunswick Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, is a citizen of said State and has its principal place of business in said State. Defendant Oracle Road Lumber Company is a corporation organized and existing under and by virtue of the laws of the State of Arizona, is a citizen of said State and has its principal place of business in said State. Defendant State of Arizona, ex rel Arizona State Tax Commission, is a body politic and is a citizen of the State of Arizona. The true names of John Doe and Jane Doe, husband and wife, 1 through 10, are unknown to plaintiff at this time, but upon learning the same, such true names will be substituted therefor. Upon information and belief each of said persons is a citizen of a State other than the State of Colorado. The true names of Coe Corporation, 1 through 5, are unknown to plaintiff at this time, but upon learning the same such true names will be substituted therefor. Upon

information and belief each of said corporations is incorporated under the laws of a State other than the State of Colorado and none has its principal place of business in Colorado.

II.

At the time or times as hereinafter alleged, defendants Jerome C. Greenwell and Reuben R. Rubinstein were acting for and on behalf of themselves and the community consisting of themselves and their respective wives.

III.

The matter in controversy exceeds, exclusive of interest and costs the sum of $10,000.00.

IV.

On May 5, 1961, defendants Perillo and Diamond Pin Lanes, Inc., for value received, made, executed and delivered to plaintiff their promissory note in writing, dated May 5, 1961, in the principal sum of Two Hundred Sixty Thousand Dollars ($260,000.00) with interest thereon at the rate of 6¾ percent per annum on the unpaid principal. A photostatic copy of said promissory note is attached hereto marked Exhibit A and by this reference made a part hereof as though fully incorporated herein.

V.

Concurrently with the execution and delivery of said promissory note, and as part of the same transaction and for the purpose of securing the payment

of said promissory note, said Diamond Pin Lanes, Inc. made, executed and delivered to plaintiff that certain Realty Mortgage dated the 5th day of May, 1961, a photostatic copy of said Realty Mortgage being attached hereto marked Exhibit B and by this reference made a part hereof as though fully incorporated herein. The real property affected by said Realty Mortgage is situated in Pima County, Arizona, and is described as follows:

> All of Lot A-1 of Miramonte Terrace, a Subdivision of Pima County, Arizona, according to the Amended Map or Plat thereof of record in the office of the County Recorder of Pima County, Arizona, in Book 12 of Maps and Plats, at Page 95 thereof;
>
> EXCEPT the East 200 feet thereof.

VI.

The aforementioned Realty Mortgage was recorded on February 2, 1962, in Docket Book 1889 at pages 232 and 234 thereof in the Office of the County Recorder of Pima County, Arizona.

VII.

Some time between December 3, 1963 and January 8, 1964, defendant Jerome C. Greenwell made, executed and delivered to plaintiff an Assumption Loan Agreement, a copy of said Assumption Loan Agreement being attached hereto marked Exhibit C and by this reference made a part hereof, whereby said defendants, for value, assumed and agreed to pay the indebtedness represented by Exhibit A.

VIII.

Defendant Tucson Athletic Club, Inc., an Arizona corporation, became the record owner of the above described real property by virtue of a deed from Diamond Pin Lanes, Inc. an Arizona corporation, to said defendant dated August 5, 1966, and recorded September 29, 1966, in the Office of the County Recorder of Pima County, Arizona, in Docket Book 2841 at pages 79 and 80 and by virtue of a Sheriff's Deed dated January 16, 1967, recorded on January 16, 1967, in the Office of the County Recorder of Pima County, Arizona, in Docket Book 2911 at Page 423. Thereafter, on or about August 5, 1966, the said defendant Tucson Athletic Club, Inc. made, executed and delivered to plaintiff a Conditional Assignment of Rents, Revenues and Income concerning the above described real property, a copy of said Conditional Assignment of Rents, Revenues and Income being attached hereto marked Exhibit D and by this reference made a part hereof. Under the terms of said Conditional Assignment plaintiff is entitled without notice to take possession of said real property, operate the same and collect all revenues, rents and income and do all other acts as therein provided.

IX.

On or about the 4th day of August, 1966, the defendants Tucson Athletic Club, Inc., Marvin A. Kitay and Reuben R. Rubinstein and plaintiff entered into that certain Commitment For Loan, a copy of which is attached hereto as Exhibit E and by this reference made a part hereof, and that certain Addendum to

Commitment For Loan, a copy of which is attached hereto as Exhibit F and by this reference made a part hereof. On or about the 4th day of August, 1966, defendant Tucson Athletic Club, Inc. and plaintiff entered into an Extension Agreement concerning said promissory note. Exhibit A, a copy of said Extension Agreement being attached hereto and marked Exhibit G and by this reference made a part hereof.

X.

Since the date of said Extension Agreement, Exhibit G, plaintiff has received only small sporadic payments aggregating the sum of $5,756.65 on said promissory note, Exhibit A, described in paragraph IV above, and has received nothing thereon since November 7, 1967, at which time plaintiff received the sum of Four Hundred Dollars ($400.00). With additions of interest due, but not paid, which were added to principal in accordance with the terms of said promissory note, there is due and owing on said promissory note as of January 1, 1968, with the inclusion of interest due to that date the total principal sum of Three Hundred Sixty-Five Thousand Six Hundred Nine and 54/100 Dollars ($365,609.54). On account of the aforementioned default in the payment of said promissory note, plaintiff has elected to declare the entire principal and unpaid interest on said note to be immediately due and payable.

XI.

Said promissory note, Exhibit A, provides that if the note or interest thereon be not paid when due,

or when suit is brought, that the makers and endorsers severally agree to pay all reasonable costs of collection, including attorney's fees. Said Realty Mortgage, Exhibit B, provides that in the event the mortgagor fails to pay taxes, assessments, insurance premiums and other legal expenses, fees, costs and charges paid affecting the same, that plaintiff as mortgagee may pay same and that such sums paid by plaintiff shall become a lien upon the above described real property, added to the amount of said promissory note and said Realty Mortgage. Said Realty Mortgage became further in default on account of the non-payment of the second half of the 1965 real property taxes, all of the 1966 real property taxes and the first half of the 1967 real property taxes. On account of the non-payment of the second half of the 1965 taxes, the subject property was sold for delinquent taxes. To redeem said mortgaged property and to pay delinquent 1966 and first half of 1967 taxes, including interest and penalties thereon, plaintiff on January 2, 1968, paid the total sum of $25,-406.25 to the County Treasurer of Pima County, Arizona, for said taxes, interest and penalties. On account of the failure on the part of the defendant Tucson Athletic Club, Inc. to keep the hazard insurance in force on the improvements on said real property as required, plaintiff on January 12, 1968, was required to and did pay Tucson Realty and Trust Company the sum of One Thousand Fifteen and no/100 Dollars ($1,015.00) to keep said insurance in force.

XII.

Plaintiff has been compelled to expend the sum of $60.00 in securing a title search to said real property and the real property described in Count Two following preliminary to the filing of this Complaint. The sum of 10-percent of the amount due and owing under said promissory note, Exhibit A, and said Realty Mortgage, Exhibit B, is a reasonable attorneys' fee in this action.

XIII.

Pursuant to the terms of said Commitment for Loan, Exhibit E, and Addendum thereto, Exhibit F, defendant Tucson Athletic Club, Inc. for value received, and for the purpose of further securing said promissory note, Exhibit A, made, executed and delivered to plaintiff that certain Realty Mortgage dated the 5th day of August, 1966, a copy of said Realty Mortgage being attached hereto and marked Exhibit H, and by this reference made a part hereof. Said Realty Mortgage, Exhibit H, is a Second Realty Mortgage on the real property described in paragraph V above and a First Realty Mortgage on certain property described in paragraph V of Count Two of this Complaint. Said Realty Mortgage was recorded in the office of the County Recorder of Pima County, Arizona, on August 9, 1966, in Docket Book 2812 at pages 54 to 59, and said Realty Mortgage is prior to and superior to the lien of any of the defendants and subject to and inferior to only the First Mortgage lien of plaintiff described in paragraph V of Count One of this Complaint.

XIV.

On or about the 5th day of August, 1966, defendant Tucson Athletic Club, Inc. for value received, and for the purpose of further securing said promissory note, Exhibit A, made, executed and delivered to plaintiff that certain Chattel Mortgage dated the 5th day of August, 1966, a copy of said Chattel Mortgage being attached hereto and marked Exhibit I and by this reference made a part thereof. Said Chattel Mortgage was recorded in the Office of the County Recorder of Pima County, Arizona, on November 2, 1966, in Docket Book 2863, at pages 438 to 447, inclusive.

XV.

On or about the 7th day of December, 1966, defendant Tucson Athletic Club, Inc. for value received, and for the purpose of further securing said promissory note, Exhibit A, made, executed and delivered to plaintiff that certain Assignment dated the 7th day of December, 1966, a copy of said Assignment being attached hereto and marked Exhibit J and by this reference made a part hereof. Said Assignment was recorded in the Office of the County Recorder of Pima County, on the 30th day of December, 1966, in Docket Book 2901 at pages 940-942 inclusive.

XVI.

On or about the 30th day of August, 1967, defendant Tucson Athletic Club, Inc. for value received, and for the purpose of securing said promissory note, Exhibit A, made, executed and delivered to plaintiff

that certain Chattel Mortgage dated the 30th day of August, 1967, a copy of said Chattel Mortgage being attached hereto and marked Exhibit K and by this reference made a part hereof. Said Chattel Mortgage was recorded in the Office of the County Recorder of Pima County, Arizona, on September 15, 1967, in Docket Book 3079 at pages 632 to 635 inclusive.

XVII.

Plaintiff is now the owner and holder of said promissory note, Exhibit A, Realty and Chattel Mortgages, Exhibits B, H, I and K, Conditional Assignment of Rents, Revenues and Income, Exhibit D, and Assignment, Exhibit J. Defendant Tucson Athletic Club, Inc. is in default under said Realty and Chattel Mortgages and on account thereof and pursuant to the terms of said Mortgages and on account thereof and pursuant to the terms of said Mortgages, said Conditional Assignment of Rents, Revenues and Income, and said Assignment, plaintiff is entitled to take possession of said real and personal property described therein, and rent, lease or operate the same.

XVIII.

That the State of Arizona, ex rel Arizona State Tax Commission is a defendant by virtue of a Notice and Claim of Lien in the amount of $5,632.82 filed against defendant Tucson Athletic Club, Inc. dated November 8, 1967, and filed in the Office of the County Recorder of Pima County, Arizona, on November 24, 1967 in Docket Book 3127 at Page 128.

IX.

Defendants claim to have some right, title, interest, claim, lien or demand in and to the mortgaged real and personal property described herein, but whatever right, title, interest claim, lien or demand said defendants have, and each of them has, the same are, and the same is inferior and subordinate to the Realty Mortgages, Exhibits B and H, and the Chattel Mortgages, Exhibits I and K, above described.

COUNT TWO

I.

Realleges the allegation contained in paragraphs I and II of Count One.

II.

The amount in controversy in this Count Two exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

III.

On or about the 4th day of August, 1966, defendant Tucson Athletic Club, Inc., Marvin A. Kitay and Reuben R. Rubinstein entered into with plaintiff that certain Commitment For Loan, a copy of which is attached hereto as Exhibit E and by this reference made a part hereof.

IV.

Pursuant to the terms of the above Commitment for Loan, Exhibit E, on or about August 5, 1966, defendants Tucson Athletic Club, Inc., Marvin A. Kitay

and Reuben R. Rubinstein, for value received, made, executed and delivered to plaintiff their promissory note in the principal amount of Twenty-Two Thousand Five Hundred Dollars ($22,500.00) with interest thereon at the rate of 8 per cent per annum from date, a copy of said promissory note being attached hereto marked Exhibit L and by this reference made a part hereof.

V.

Concurrently with the execution and delivery of said promissory note, Exhibit L, and as a part of the same transaction and for the purpose of securing the payment of said promissory note, defendant Tucson Athletic Club, Inc. made, executed and delivered to plaintiff that certain Realty Mortgage dated August 5, 1966, a copy of said Realty Mortgage being attached hereto as Exhibit H and by this reference made a part hereof. Said Realty Mortgage is a Second Realty Mortgage on the property described in paragraph V of Count One of this Complaint and a First Realty Mortgage on the following described real property:

> The West 47 feet of the East 784 feet of the South 260 feet of Lot 9, Block 9 Miramonte Terrace, in the City of Tucson, according to the plat of record in the Office of the Pima County Recorder, in Book 11 of Maps, page 91.

VI.

Said Realty Mortgage, Exhibit H attached hereto, was recorded in the Office of the County Recorder of Pima County, Arizona, on August 19, 1966, in Docket Book 2812 at pages 54 to 59.

VII.

On August 5, 1966, defendant Tucson Athletic Club, Inc. for the purpose of further securing said promissory note, Exhibit L, made, executed and delivered to plaintiff that certain Chattel Mortgage dated August 5, 1966, a copy of said Chattel Mortgage being attached hereto as Exhibit I and by this reference made a part hereof.

VIII.

Said Chattel Mortgage was recorded in the Office of the County Recorder of Pima County, Arizona, on November 2, 1966, in Docket Book 2863 at Pages 438 to 447.

IX.

Defendants Tucson Athletic Club, Inc., Marvin A. Kitay and Reuben R. Rubinstein are in default under the terms of said promissory note, Exhibit L, in that said defendants have failed to make any payment due under the terms of said promissory note. Pursuant to the terms contained in said promissory note, plaintiff has elected to declare the entire principal amount of $22,500.00 due and owing plus interest thereon at the rate of 8-percent per annum until paid.

X.

Said promissory note Exhibit L, Realty Mortgage, Exhibit H and Chattel Mortgages, Exhibits I and K, all provide for reasonable attorneys' fees in the event that suit be brought on said note and mortgages. The sum of 10-percent of the amount due and owing on

said promissory note, Exhibit L, is a reasonable attorneys' fee.

XI.

Said Realty Mortgage, Exhibit H, provides that any sums paid by plaintiff as and for real property taxes on said property which were not paid by defendant Tucson Athletic Club, Inc. can be paid by plaintiff and added to the amount due under said promissory note, Exhibit L. Plaintiff on January 24, 1968, paid the sum of $117.67 to the County Treasurer of Pima County, Arizona, for delinquent second half of 1966 and first half of 1967 taxes. Said Realty Mortgage, Exhibit H, further provides that any amount expended by plaintiff as expenses of search of title can be added to said promissory note. Plaintiff has expended the sum of $60.00 as and for a title search on the real property described in paragraph V of Count One and the real property described in paragraph V of this Count Two.

XII.

On or about the 30th day of August, 1967, defendant Tucson Athletic Club, Inc. for value received and for the purpose of further securing said promissory note Exhibit L, made, executed and delivered to plaintiff that certain Chattel Mortgage dated the 30th day of August, 1967, a copy of said Chattel Mortgage being attached hereto and marked Exhibit K and by this reference made a part hereof. Said Chattel Mortgage was recorded in the Office of the County Recorder of Pima County, Arizona, on the 15th day of September, 1967, in Book 3079, pages 632 to 635 inclusive.

XIII.

Plaintiff is now the owner and holder of said promissory note, Exhibit L, said Realty and Chattel Mortgages, Exhibits H, I and K, said Conditional Assignment of Rents, Revenues and Income, Exhibit D, said Assignment, Exhibit J. Defendants Tucson Athletic Club, Inc. Kitay and Rubinstein are in default as above described and on account of the terms of said instruments, plaintiff is entitled to possession thereof and to operate said property.

XIV.

That the State of Arizona, ex rel Arizona State Tax Commission is a defendant by virtue of a Notice and Claim of Lien in the amount of $5,632.82 filed against defendant Tucson Athletic Club, Inc. dated November 8, 1967 and filed in the Office of the County Recorder of Pima County, Arizona on November 24, 1967, in Docket Book 3127 at Page 128.

XV.

Defendants claim to have some right, title, interest, claim, lien or demand in and to the real and personal property described herein, but whatever right, title, interest, claim, lien or demand said defendants have, and each of them has, the same are and the same is, inferior and subordinate to said Realty Mortgage, Exhibit H and said Chattel Mortgages, Exhibits I and K.

WHEREFORE, plaintiff prays for Judgment as follows:

1. That under Count One plaintiff have Judgment against defendants Diamond Pin Lanes, Inc., F. J. Perillo and Ruth S. Perillo, husband and wife, Jerome C. Greenwell and Garnett E. Greenwell, husband and wife, and Tucson Athletic Club, Inc. and each and all of them, for the total principal sum of the promissory note, Exhibit A, of $365,609.54, plus interest thereon at the rate of 6¾ percent per annum from January 1, 1968, until paid, for the sum of $25,406.25, plus interest thereon at the rate of 8 percent per annum from January 2, 1968, until paid, for taxes paid by plaintiff, for the sum of $1,105.00 plus interest thereon at the rate of 8 percent per annum from January 12, 1968, for insurance premium paid by plaintiff, for attorneys' fees in the amount of 10 percent of the amount due and owing under said promissory note, Exhibit A, for the sum of $60.00 for the costs of title search, for plaintiff's costs herein incurred as to said defendants, and for such other sums as plaintiff may be compelled to advance from time to time to protect the mortgaged premises in accordance with Exhibit B and the Orders of this Court.

2. That under Count Two plaintiff have Judgment against the defendants Tucson Athletic Club, Inc., Marvin A. Kitay, Reuben R. Rubinstein and Irma Rubinstein, husband and wife, and each and all of them, for the total principal sum of $22,500.00 due under the promissory note, Exhibit L, together with interest on said sum at the rate of 8 percent per annum from August 5, 1966, until paid, for the sum of $117.67 plus interest thereon at the rate of 8 per-

cent per annum thereon from January 24, 1968, for taxes paid by plaintiff, for a sum equal to 10 percent of the balance due under said promissory note as and for plaintiff's attorneys' fees, for the plaintiff's costs of suit herein incurred as to said defendants and for such other sums as plaintiff may be compelled to advance from time to time to protect the mortgaged premises in accordance with Exhibit H and the Orders of this Court.

3. That the Realty Mortgages and Chattel Mortgages hereinbefore referred to be declared to be a prior lien to any claim of the defendants, or either or any of them, or anyone claiming under them, or either or any of them, on said mortgaged real property and said mortgaged personal property hereinbefore described.

4. That the usual and proper Decree be made for the foreclosure of said Realty Mortgages and Chattel Mortgages and that said Realty Mortgages and Chattel Mortgages by the judgment shall be adjudged foreclosed; that the real properties covered by said Realty Mortgages and the personal property covered by said Chattel Mortgages be Ordered sold in parcels or en masse as the Court may direct; that the Clerk of the above entitled Court be directed to issue a Special Writ of Execution to the United States Marshal directing said United States Marshal to sell the real properties described in said Realty Mortgages and the personal property described in said Chattel Mortgages for the purpose of satisfying the Judgment of this plaintiff, the sale or sales to be made by the procedures of the applicable statutes; that the proceeds

of said sale or sales be first applied to the payment of costs of the sale or sales or any adjudicated prior liens upon the real and personal property, and the balance applied to the payment of the amount found due for principal and interest, attorneys' fees, insurance premiums, taxes, title search, charges, and for plaintiff's costs herein incurred, and for such other amounts that plaintiff may be compelled to pay in order to protect the mortgaged premises, and in case any part of the proceeds of the sale of said properties remains after the payment of all of the foregoing said balance remaining shall be paid as the Court herein may direct; that at sale or sales all the right, title, interest, claim, lien or demand of the defendants, and each of them, to the personal property described in said Chattel mortgages be sold and transferred to the purchaser; and that the defendants, and each and all of them, and every person claiming under them, or either or any of them, whether as purchasers, encumbrancers, lienholders, or otherwise, may be barred and foreclosed of all rights, title, and other interest in said mortgaged real properties or part thereof, except only lawful right of redemption; and when the time for redemption sha.l have expired, that if the property be not then redeemed that all of the right, title, claim, lien or demand whatsoever of the defendants, and each and all of them, as to said real properties shall be forever barred; and that the plaintiff may become a purchaser at said execution sales.

5. That the said United States Marshal, after the period of redemption has expired, if said real prop-

erties be not then redeemed, shall execute a deed to the purchaser or purchasers and that the said purchaser or purchasers shall be let into possession of the premises upon the production of the United States Marshal's Deed therefor and for that purpose shall and may obtain from this Court a Writ of Possession to the premises and property so sold should possession thereof be refused or not already obtained.

6. That the plaintiff have a deficiency judgment against the defendants Diamond Pin Lanes, Inc., Tucson Athletic Club, Inc., F. J. Perillo and Ruth E. Perillo, husband and wife, Jerome C. Greenwell and Garnett E. Greenwell, husband and wife, and each and all of them, for any sum included in the Judgment rendered in this action under Count One relating to the promissory note, Exhibit A, and have deficiency judgment against defendants Tucson Athletic Club, Inc., Marvin A. Kitay and Reuben R. Rubenstein and Irma Rubinstein, husband and wife, for any sum included in this action under Count Two remaining on account of the Judgment given on the promissory note, Exhibit L.

7. That plaintiff have such other and further relief as to the Court may seem appropriate.

Holesapple, Conner, Jones,
McFall & Johnson

/s/ By Marshall Jones
Attorneys for Plaintiff
Fourth Floor Valley National
Building
Tucson, Arizona.

State of Arizona
County of Pima /ss/

G. Marshall Jones, being first duly sworn, deposes and says: That he is attorney for the plaintiff in the above entitled action, is authorized to and does make this verification for and on behalf of said plaintiff; that he has read the foregoing Complaint and knows the contents thereof; that the matters and things therein alleged are true except as to such matters therein stated on information and belief and as to such matters and things he believes them to be true.

/s/ G. Marshall Jones

Subscribed and sworn to before me this 25th day of January, 1968.

/s/ Charity Rivers
Notary Public

My Commission Expires:
April 15, 1970

PLAINTIFF'S EXHIBIT 9

PLAINTIFF'S EXHIBIT 1

INSTALLMENT NOTE

May 5, 19 61

$240,000.00

AFTER DATE, FOR VALUE RECEIVED, I promise to pay to the order of
UNITED AMERICAN LIFE INSURANCE COMPANY
the sum of Two Hundred Sixty Thousand and no/100ths - - - - - - - - - - - - DOLLARS,
with interest at the rate of 4-3/4 per centum per annum. Said principal and interest are payable at
1717 California Street, Denver 2, Colorado
in monthly installments of Two Thousand Three Hundred and no/100ths - - - - - DOLLARS,
commencing on the 1st day of July 1961, and continuing on the 1st day of each month thereafter for 180 months
thereafter, each installment when so paid to be applied first to the payment of the interest on the unpaid principal amount hereof, and the balance
thereof on account of the principal hereof. Unless sooner paid, all unpaid balance of principal and
interest shall become due and payable on the 1st day of January A. D. 1976. With Cumulative privilege
to prepay one payment each calendar year with the further privilege of paying the loan in
full after the third year upon payment of a 2% penalty, computed on it in the
usual manner. The loan is to retain without penalty after the loan has been in force
for ten years.

If default shall be made in the payment of any sum due hereunder, the principal and accrued interest thereon shall draw interest
at the rate of 8 per cent per annum, and shall follow in like manner any payment of principal or interest when due or any default under
the provisions of this note, or of any mortgage, deed of trust or other instrument securing the payment hereof, shall continue for
thirty days after notice thereof shall have been given to the undersigned or to any one of them, or to any person in possession of any
of the property of the undersigned, or any part thereof, or any interest therein, by the holder hereof, or by any person acting for it,
or the owner and holder of the indebtedness hereby evidenced, or any part thereof, shall have the right to declare the whole of the
principal and interest thereon to be immediately due and payable hereunder, and to enforce the collection thereof by foreclosure of any
mortgage or deed of trust securing the payment hereof, or by any other proceedings under power contained in, or given by, any such
mortgage or deed of trust, or by any other proceedings at law or in equity, or otherwise, as the holder hereof may elect. The undersigned
and all endorsers hereof severally waive presentment for payment, protest and notice of protest and of non-payment of this note, and
agree that the time of payment hereof may be extended without notice to them, and that they will remain bound for the payment hereof
notwithstanding any such extension. The undersigned and all endorsers hereof severally waive the benefit of any and all laws providing
for the stay of execution or delay in the enforcement of the payment hereof, and all rights of appraisement and homestead exemption in
any property, real or personal, which they may now or hereafter have under the laws of the State of Colorado or any other State or
Territory of the United States.

It is agreed that the loan evidenced by this note is secured by a policy of insurance issued by the United American Life Insurance Co. in the amount of $260,000.00 which have been assigned as collateral for the loan. This policy must be kept in force during the term of this loan. It is therefore understood that upon discontinuing either policy, the whole unpaid balance of principal and interest shall become due and payable immediately.

Attest: (Secretary)

DIAMOND PIN LAMES, INC.

By (President)

MEMORANDUM OF PAYMENTS

Date of Payment	Amount Paid	Paid on Interest	Pays Interest to	Paid on Principal	Balance of Principal	Received by

INSTALLMENT NOTE

$ _____

_____

_____

_

STATE OF ARIZONA
COUNTY OF PIMA } ss.

I hereby certify that within instrument was filed for record in Pima County, State of Arizona

Witness my hand and Official Seal.

ANNA HILLINGER, County Recorder

Indexed	Digest	Checked
✓		✓

No. 8039
Book 1889 Page 334
Date: '62 FEB 2 PM 3:41
Request of:

By Deputy

Fee: 3.00

MORTGAGE

REALTY MORTGAGE

THIS MORTGAGE, made this 5th day of May 19 61

between

DIAMOND PIN LANES, INC., an Arizona corporation

(hereinafter referred to as the Mortgagor, and including heirs, executors, administrators, successors, and assigns of the Mortgagor) and

UNITED AMERICAN LIFE INSURANCE COMPANY OF DENVER, COLORADO

(hereinafter referred to as the Mortgagee, and including heirs, executors, administrators, successors, and assigns of the Mortgagee),

WITNESSETH: That the Mortgagor, for and in consideration of the sum of

TWO HUNDRED SIXTY THOUSAND AND NO/100 - - - - - - - - - - - - - - - - - - -

DOLLARS ($ 260,000.00), lawful money of the United States, in hand paid, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, and convey unto the Mortgagee that certain property lying and being in the County of Pima, State of Arizona, hereinafter referred to as said property, bounded and described as follows, to-wit:

All of Lot A-1 of Miramonte Terrace, a Subdivision of Pima County, Arizona, according to the Amended Map or Plat thereof of record in the office of the County Recorder of Pima County, Arizona, in Book 12 of Maps and Plats, at Page 95 thereof;
EXCEPT the East 200 feet thereof.

PLAINTIFF'S EXHIBIT 9

Exhibit B

ARIZONA LAND TITLE AND TRUST CO.

69915 WO

including all buildings and improvements now or hereafter erected thereon and all heating, plumbing, and lighting fixtures and equipment now or hereafter attached to or used in connection with the improvements on said property, water and water rights, pipes, flumes and ditches and the water flowing through the same, also all window shades, and all stoves, tanks, and heaters connected by water or gas pipes, thereunto belonging or in anywise appertaining, together with all and singular the tenements, hereditaments, appurtenances, and privileges, and the reversion, reversions remainder, remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD the same unto the Mortgagee forever.

And the Mortgagor hereby covenants and warrants to be well and truly seized of a good and perfect title in fee simple to said property and to have good right and lawful authority to convey the same to the Mortgagee and that the title hereby conveyed is free, clear and unencumbered; and the Mortgagor will forever warrant and defend the same to the Mortgagee against all claims whatsoever.

This conveyance is intended as a mortgage to secure the payment of that certain promissory note given by the Mortgagor [redacted] in the amount of $260,000.00 of even date herewith.

The Mortgagor agrees to pay all taxes, assessments, and charges which shall be assessed or may become a lien on said property before the same shall become delinquent, and to insure at his own cost and charge and keep insured the buildings thereon against loss or damage by fire or other hazards in the sum of an amount as required by the mortgagee

Dollars, in insurance companies represented by agency to be selected by the Mortgagee, and said insurance policies to be payable to the Mortgagee as his interest may appear; and in default thereof it shall be lawful for the Mortgagee to pay such taxes or assessments or effect such insurance, and the said taxes, assessments, and insurance premium and other legal expenses, fees, costs, and charges paid for effecting the same, together with interest thereon at the rate of eight (8) per cent per annum, shall be a lien upon said property, added to the amount of said note and secured hereby.

POOR COPY

And the Mortgagor agrees to keep the buildings and other improvements on said premises in good repair, and neither to commit nor suffer any waste upon said premises, nor to do any other act whereby the property hereby conveyed shall become less valuable.

In the event there be a prior mortgage against said property or any other lien and such mortgage or lien becomes in default, then said Mortgagee is hereby authorized to pay such sum or sums as may be necessary to protect the security of this mortgage and any and all sums so paid shall be a lien upon said property, added to the amount of said note and secured hereby.

In the event default be made by the Mortgagor in the payment of any sum or sums hereinbefore provided for, it is hereby agreed that the rents from said property, if any, are hereby assigned unto the Mortgagee and shall be applied as received by the Mortgagee to the payment of any sum or sums then due under the terms of this mortgage.

And this instrument shall be void if said promissory note , principal and interest, and each and every of the payments and conditions herein contained, be well and truly paid when due and performed in manner and time, according to their true tenor and effect. But it is distinctly understood and agreed that if the interest on said promissory note or the principal thereof shall not be punctually paid when the same shall become due, as in said promissory note mentioned, or if any of the conditions herein be broken or any payment be not made, including the said taxes, assessments, charges, liens, or insurance, then, and in such case, the principal sum of said note and the interest thereon, together with any other advances made, as herein provided, shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the Mortgagee for the recovery of the same, either by suit on said note or on this mortgage and note , and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest thereon, it shall and may be lawful for the Mortgagee to include in the judgment that may be recovered all payments that the Mortgagee may be obliged to make for his security as hereinbefore provided, together with attorney's fees in a reasonable sum to be fixed by the court and expenses of a search of the title.

It is further understood that if more than one join in the execution hereof, or may be of the feminine or neuter gender, the pronouns and relative words herein used shall be read as if written in plural, feminine or neuter, respectively.

IN WITNESS WHEREOF, said Mortgagor has executed this instrument the day and year first above written.

ATTEST: Ruth Perillo
Ruth P. Perillo
Secretary

DIAMOND PIN LANES, INC.
BY: F. J. Perillo
President

STATE OF ARIZONA,
County of Pima } ss.

This instrument was acknowledged before me this 1st day of May, 19 61,
by F. J. PERILLO, as President, and RUTH PERILLO, as Secretary
of DIAMOND PIN LANES, Inc., an Arizona corporation, as an act of the corporation.

Notary Public.

My commission expires: My Commission Expires Feb. 12, 1964

STATE OF
County of } ss.

This instrument was acknowledged before me this day of 19
by

Notary Public.

My commission expires:

PLAINTIFF'S EXHIBIT 9 No. 1

Diamond Pin Lanes, Inc.
Ruth K. Perillo

20-49			FIRST PAYMENT DUE		3-1-62	AMT.	2,300.00	MADE			
REC. NO.	PAYMENT	PRINCIPAL	DUE DATE	DATE PAID	PRINCIPAL BALANCE	DIST. NO.	INTEREST	PRINCIPAL	DUE DATE	DATE PAID	PRINCIPAL BALANCE
			ORIG. BAL.	AT PRESENT	260,000.00	Int. Capitalized due 2-			-66 to	9-1-66	8 mos.
	1462.50	837.50	Mar 62	3-8-62	259,162.50	@8%	being an amount of		$17,447.62		334,475.52
	1457.79	842.21	April	4-4-62	258,320.29		1881.43		10-1-66		336,356.95
	1453.05	846.95	May	5-7-62	257,473.34		2242.38		11-1-66		338,599.33
	1448.30	851.70	June	6-12-62	256,621.64		2257.33		12-1-66		340,856.66
	1443.49	856.51	July	7-11-62	255,765.13		2272.38		1-1-67		343,129.04
	1438.68	861.32	August	8-10-62	254,903.81		2287.53		2-1-67		345,416.57
	1433.83	866.17	Sept.	9-12-62	254,037.64		2302.78		3-1-67		347,719.35
	1428.96	871.04	Oct.	10-9-62	253,166.60	Paid	on Account	550.15		3-2-67	347,169.20
	1424.06	875.94	Nov.	11-6-62	252,290.66	Paid	on Account	837.50		3-9-67	346,331.70
	1419.13	880.87	Dec.	12-11-62	251,409.79		2308.88		4-1-67		348,640.58
	1414.18	885.82	Jan 63	1-11-63	250,523.97		2324.27		5-1-67		350,964.85
	1409.20	890.80	Feb.	2-14-63	249,633.17	Paid	on Account	520.00		4-26-67	350,444.85
	1404.19	895.81	March	3-8-63	248,737.36	Paid	on Account	364.00		4-27-67	350,080.85
	1399.15	900.85	April	4-16-63	247,836.51	Paid	on Account	364.00		5-2-67	349,716.85
	1394.08	905.92	May	5-10-63	246,930.59	Paid	on Account	364.00		5-5-67	349,352.85
	1388.98	911.02	June	6-12-63	246,019.57	Paid	on Account	182.00		5-12-67	349,170.85
	1383.87	916.13	July	7-19-63	245,103.44		2327.81		6-1-67		351,498.66
	1378.72	921.28	Aug.	10-15-63	244,182.16		2343.33		7-1-67		353,841.99
	1373.53	926.47	Sept.	11-20-63	243,255.69		2358.95		8-1-67		356,200.94
	1368.32	931.68	Oct.	1-8-64	242,324.01		2374.68		9-1-67		358,575.62
	1363.08	936.92	Nov.	2-5-64	241,387.09		2390.51		10-1-67		360,966.13
	1357.81	942.19	Dec.	3-6-64	240,444.90	Paid	on Account	1675.00		10-9-67	359,291.13
	1352.50	947.50	Jan 64	4-6-64	239,497.40	Paid	on Account	500.00		10-12-67	358,791.13
	1347.18	952.82	Feb.	4-6-64	238,544.58		2391.94		11-1-67		361,183.07
Int Capitalized	due 3-1-	64 to 9-1-64	Inc. 7 mos.			Paid	on Account	400.00		11-7-67	360,783.07
@ 8%	being an amount	of $9,551.29			248,095.87		2405.22		12-1-67		363,188.29
	1395.54	------	10-1-64	11-16-64	248,095.87		2421.25		1-1-68		365,609.54
	1395.54	------	11-1-64	12-27-64	248,095.87	Int. Capitalized due 2-1-68 to				9-3-68	Inc @8%
	1395.54	------	12-1-64	12-31-64	248,095.87	being an amount of $19,987.50					385,597.04
	1395.54	------	1-1-65	2-1-65	248,095.87	Delinquent Taxes Pd 1-2-68			$25,406.25		411,003.29
	1395.54	------	2-1-65	5-6-65	248,095.87	Interest on next above as of 9-3-68					
Delinquent Taxes	Pd 12-31-	6585	1	998.28	299,194.15		1.80				412,385.09
Paid on Account			260.00	2-8-66	298,834.15	Insurance Premium Pd 1-12-68			$1,105.00		413,490.09
Int Capitalized	due 3-1-	65 to 1-1-66	Inc 11 mos.			Int on next above as of 9-3-68			58.75		413,548.84
@8%	being an amount	of $18,193.75			317,027.90	Advance to receiver 2-7-68			$1,000.00		414,548.84

| DATE | | | | |

Diamond Pin Lanes, Inc.

No. 70-49 FIRST PAYMENT DUE 3-1-62 AMT. $2,300.00 NAME Ruth F. Perrin and Perrin

INT. NO.	INTEREST	PRINCIPAL	DUE DATE	DATE PAID	PRINCIPAL BALANCE	INST. NO.	INTEREST	PRINCIPAL	DUE DATE	DATE PAID	PRINCIPAL BALANCE
Balance Forward			PRIN. BAL.	AT PRESENT	414,548.84						
Int. on next above as of			9-3-68		45.98 414,594.82						
Payment to Arizona State Liquor Department for											
License renewal 3-1-68 of -----					165.00 414,759.82						
Int. on next above as of			9-3-68		7.44 414,767.26						
Payment for Title Policy			4-11-68		60.00 414,827.26						
Int. on next above as of			9-3-68		1.45 414,828.71						
Advance to receiver 4-10-68 of					2300.82 417,129.53						
Int. on next above as of			9-3-68		74.46 417,203.99						
Advance to receiver 5-1-68					1200.00 418,403.99						
Int. on next above as of			9-3-68		33.75 418,437.74						
Advance to receiver 7-1-68					6000.00 424,437.74						
Int. on next above as of			9-3-68		85.12 424,522.86						
Advance to receiver 7-5-68					2500.00 427,022.86						
Int. on next above as of			9-3-68		33.60 427,056.46						
Advance to receiver 7-15-68 of											
				815.24	8.73 442,305.19						
Int. on next above as of			9-3-68		169.50 442,474.69						
Advance to receiver 8-12-68					5000.00 447,474.69						
Int. on next above as of			9-3-68		24.42 447,499.11						
Advance to receiver 8-27-68					3200.00 450,699.11						
Int. on next above as of			9-3-68		4.97 450,704.08						

TOTAL PAYMENTS INTEREST & FEES

PRINT PLEASE NOTE—THIS SCALE CORresponds TO TYPEWRITER (PICA) SCALE—SET PAPER GUIDE SO THAT CARD SCALE WILL REGISTER WITH PRINTING SCALE WHEN CARD IS TURNED INTO TYPING POSITION. START FIELDS THREE (3) POINTS FROM LEFT EDGE OF CARD. USE OTHER POINTS OF SCALE FOR OTHER BEGINNING OF FIELDS. SET TABULATING TO SAME POINT AS START OF EACH FIELD OF INFORMATION. FOLD CARD ON SCORING ONLY AFTER TYPING. USE NEW TYPEWRITTEN RIBBON.

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UNITED AMERICAN LIFE INSURANCE COMPANY

No. 20-49 FIRST PAYMENT DUE 10-1-66 AMT. $ 200.00 NAME Tucson Athletic Club, Inc. Marvin A. Kiray, and Reuben R. Rubinstein

INST. NO.	INTEREST	PRINCIPAL	DUE DATE	DATE PAID	PRINCIPAL BALANCE
			PRIN. BAL.	AT PURCH.	22,500.00
Int. Capitalized due 10-			-66 to	9-3-68.	Inc.
Int. being an amount of $3,740.00					26,240.00
Delinquent Taxes Pd 1-24-			68	117.67	26,357.67
Int. on next above as of			9-3-68	6.69	26,364.36
Assessment payment on 2-			10-68 o	1125.33	27,489.69
Int. on next above to 9-			-68	51.50	27,541.19

INST. NO.	INTEREST	PRINCIPAL	DUE DATE	DATE PAID	PRINCIPAL BALANCE

STATE KIND PAYMENTS J F M A M J J A S O N D J F M A M J J A S O N D INTEREST & YIELD

FIRST PLEASE NOTE—THIS SCALE CORRESPONDS TO TYPEWRITER (PICA) SCALE—SET PAPER GUIDES SO THAT CARD SCALE WILL REGISTER WITH MACHINE SCALE WHEN CARD IS TURNED INTO WRITING POSITION. START INDEX THREE (3) POINTS FROM LEFT EDGE OF CARD USE OTHER POINTS OF SCALE FOR OTHER DIVISIONS OF PAGE. TYPE, SET TABULATORS TO SAME PERFECT ALIGNMENT OF EACH DIVISION OF INFORMATION. FOLD BACK OR REMOVE STUB AFTER TYPING. USE NEW TYPEWRITTEN RIBBON.

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UNITED AMERICAN LIFE INSURANCE COMPANY

United States Court of Appeals
for the Ninth Circuit

United American Life Insurance Company, a Colorado corporation, Plaintiff-Appellee, vs. F. J. Perillo and Ruth E. Perillo, husband and wife, Defendants-Appellants.	No. 25,676

[July 24, 1972]

ORDER

Before: WRIGHT and TRASK, Circuit Judges.

The majority of the panel in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.